EON BANK BHD

v.

DEB BRATA DAS GUPTA & ANOR

HIGH COURT, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-900-1998]
3 AUGUST 1999

CIVIL PROCEDURE: *Action - Application for recovery of possession - Whether O. 83 Rules of High Court 1980 applicable - Whether there is conflict between O. 83 Rules of High Court 1980 and s. 271 National Land Code 1965*

LAND LAW: *Charge - Order for sale - Cause to the contrary - Alleged breach of s. 257(1)(c) - Whether plaintiff failed to specify total amount due - National Land Code 1965, ss. 254, 257*

LAND LAW: *Charge - Order for sale - Cause to the contrary - Alleged breach of s. 257(1)(d) - Whether plaintiff failed to require Registrar to fix reserve price - National Land Code 1965, ss. 254, 257*

The defendants were registered owners of a property charged to the plaintiff in consideration of an overdraft facility of RM3.1 million. Among the terms of the facility agreement were that the defendants were to pay to the plaintiff all interests that became due and payable pursuant to the said facility agreement and it was also a term that in the event of a default by the defendants on any of the terms and conditions of the facility and the charge, the plaintiff was at liberty to issue a notice of default pursuant to s. 254 of the National Land Code ('NLC') in compliance with Form 16D.

There was in fact a default by the defendants. By way of a registered notice of demand the plaintiff demanded payment for the sum of RM3,243,045.39. There was also a demand for vacant possession.

The defendants contended that there was "cause to the contrary" based on the following:

a) that the plaintiff had breached s. 257(1)(c) by failing to specify the total amount due to the chargee at the date on which the order was made;

b) that the plaintiff had breached s. 257(1)(d) by failing to require the registrar of the court to fix a reserve price for the purpose of the sale.

c) that the plaintiff in claiming recovery of vacant possession, should have relied on s. 271 of the NLC instead of O. 83 of the Rules of the High Court 1980 ('RHC').

Held:

[1] It is common knowledge that the originating summons cannot be heard and disposed of on the first return date endorsed on the originating summons. Once the originating summons is served the defendants would ask for time to file a reply. Hence the need for the plaintiff to file a final affidavit to ensure that it claims the exact sum on the date of the actual hearing. This the plaintiff had clearly done.

[2] In this case, the plaintiff specifically prayed for an auction date but the judge had omitted to fix an auction date in the order in terms. However, since not even the draft order had been filed, discretion therefore is exercised under the slip rule to include an amendment in the prayer and to fix the auction date. Discretion is also exercised to direct the registrar to fix a reserve price to comply with the omitted words.

[3] There is no conflict between O. 83 r. 3 of the RHC and s. 271(1)(c) of the NLC.

Case(s) referred to:
*Citibank NA v. Ibrahim Othman [1994] 1 MLJ 608 (**foll**)*
*Maimunah Megat Montak v. Mayban Finance Bhd [1996] 3 CLJ 9 **(refd)***
*Oriental Bank Bhd v. Syarikat Zahidi Sdn Bhd [1999] 1 CLJ 810 **(refd)***
*Perwira Affin Bank Bhd v. Tan Sian Ser [1995] 2 CLJ 133 (**refd**)*

Legislation referred to:
National Land Code 1965, ss. 254, 257(1)(a), (b), (c), (d), (2), 270, 271, 272, 273, 274, 275, 276, 277
Rules of the High Court 1980, O. 83 r. 3(3), (6), (7),

For the plaintiff - Kenneth Goh (S Shanti with him); M/s. NK Tan & Rahim
For the defendants - Amarjeet Singh; M/s. Zubeda & Amarjeet

Reported by Mariette Peters-Goh

JUDGMENT

RK Nathan J:

The Plaintiff's Case

The defendants are the registered owners of land held under Title H.S.(D) 31930, P.T. No. 703, in the Mukim of Kuala Lumpur (the said property).

In respect of an overdraft facility of RM3.1 million granted to the 1st defendant by the plaintiff at the defendants' request the defendants charged the said property to the plaintiff. It was a term, *inter alia*, of the facility agreement entered into by the plaintiff and the defendants that the defendants would pay to the plaintiff all interests that became due and payable pursuant to the said facility agreement. It was also a term of the said facility agreement that in the event of default by the defendants on any of the terms and conditions of the facility agreement and the charge the plaintiff was at liberty to issue out the notice of default with respect to a charge pursuant to s. 254 of the National Land Code (the NLC) in compliance with Form 16D.

It is a fact that the defendants had defaulted in the repayments of the overdraft facility or the interest accrued. By way of a registered notice of demand dated 4 December 1997 the plaintiff demanded payment from the defendants the sum of RM3,243,045.39 calculated as at 30 November 1997 together with the default interest thereon at the rate of 12.35% p.a. from 1 December 1997 till the date of full realisation. There was also a demand for vacant possession of the said property. By way of the formal form 16D notice dated 22 December 1997 the plaintiff demanded of the defendants the sum of RM3,243,045.39 calculated as at 30 November 1997 being the outstanding sum due and owing under the facility agreement granted to the 1st defendant. Payment was to have been made within seven days from the date of service of the said statutory notice. As of 17 September 1998, that is, the day encl. 2, namely, the affidavit in support of encl. 1, was affirmed, the plaintiff has averred that the outstanding sum was RM3,594,354.79.

Order 83 r. 3(3), (6) and (7) of the Rules of the High Court 1980 (the RHC) read as follows:

> (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and the chargee with particulars of –
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> (a) the amount of the advance;
>
> (b) the amount of the repayments;
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> (c) the amount of any interest or instalments in arrears at the date of issue of the originating summons and at the date of the affidavit; and
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> (d) the amount remaining due under the charge.
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> ...
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> (6) Where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).

(7) Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest.

In compliance with the above referred rules the plaintiff particularised the details in encl. 2. As of the date of the hearing of the originating summons, namely, 14 June 1999, the plaintiff's affidavit (encl. 11) stated that the outstanding amount due was RM3,858,679.81 with interest at 8.50% p.a. calculated on daily rest on the principal sum of RM3.1 million and on the accumulated interest of RM758,679.81 the interest was at 9.50% p.a. also calculated on daily rest. The plaintiff again proceeded to give the details pursuant to O. 83 r. 3(3), (6) and (7) of the RHC.

The Claim

The plaintiff prayed for the following orders:

(1) That the said property be sold by way of public auction in order for the plaintiff to recover the sum due to it under the charge.

(2) That a date for the public auction be fixed.

(3) That the SAR do fix a reserve price for the said property and for further orders relating to the sale by public auction.

(4) That the defendants do give vacant possession of the said land within seven days from the date of the order of the court.

(5) That the plaintiff be at liberty to make an offer during the public auction and if successful to be allowed to settle the amount due to the defendants from the amount outstanding and due to the plaintiff by the defendants.

(6) That the defendants be liable for all costs including the costs of the auction.

(7) That the plaintiff be allowed such further relief that the court deems fit and proper.

Preliminary Objection Of The Defendants

The defendants raised a preliminary objection and relied on encl. 5 which is an affidavit affirmed by the 1st defendant on his behalf and on behalf of the 2nd defendant. However, in his oral submission, Mr. Amarjeet Singh only raised one issue as stated in para. 4 of the said affidavit. He argued that since the affidavit in support of the originating summons (encl. 2) was bundled together with the originating summons (encl. 1), it must necessarily mean that the affidavit must have been affirmed before the originating summons was filed. To a question by the court if this was his assumption, he answered in

the affirmative. He therefore contended that when the affidavit was affirmed, there was no cause of action registered in the court. I summarily dismissed this objection and did not even require the plaintiff to respond. The very fact that both the affidavit in support and the application (the originating summons) were bound together clearly indicated that the plaintiff had intended that both the documents were to be read together. Since both documents were filed on 17 September 1998, and since even the affidavit was affirmed on 17 September 1998, there is no evidence before me, other than the admitted assumption of the defendants that the affidavit was affirmed before the originating summons was filed. In any case, the plaintiff through its branch manager had denied this assumption in his affidavit (encl. 8).

Findings Of The Court

Breach of s. 257(1)(c) and (d)

The defendants contended that the plaintiff had breached s. 257(1)(c) and (d) of the NLC as giving rise to 'a cause to the contrary'. Section 257 reads as follows:

> 257.(1) Every order for sale made by the Court under section 256 shall –
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> (a) provide for the sale to be by public auction;
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> (b) require the sale to be held on, or as soon as may be after, a date specified therein, being a date not less than one month after the date on which the order is made;
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> (c) specify the total amount due to the chargee at the date on which the order is made; and
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> (d) require the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question.
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> (2) Any such order may contain such other directions with respect to the sale as the Court may think fit, and in particular (but without prejudice to the generality of the foregoing) may, where the charge in question relates to more lands or leases than one, direct:
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> (a) that they be offered for sale individually, and in a specified order; and
>
> (b) that, in the event of the price fetched by one or more of them exceeding an amount specified in the order, or to be determined by the Registrar of the Court, the other or others shall be withdrawn from the sale, and shall cease to be subject to the order.

(3) In specifying or determining any amount for the purposes of paragraph (b) of sub-section (2), the Court or the Registrar, as the case may be, shall have regard not only to the liability of the chargor under the charge, but also to any liabilities which (under section 268) will fall to be discharged out of the proceeds of sale in priority thereto.

Mr. Amarjeet Singh argued that since there is no specific prayer asking for the amount due under the charge that the defendants have to pay, there was a breach of s. 257(1)(c). This submission is groundless. The plaintiff had in prayer (3) of the originating summons clearly asked for the sum of RM3,594,354.79 due as at 17 September 1998 upon the said charge. This was the date the originating summons and the affidavit in support were filed. By way of encl. 11 (a further affidavit) the plaintiff has stated the exact sum due as on 14 June 1999, that is, the date I heard the originating summons and the exact sum claimed is RM3,858,679.81. Surely it is common knowledge that the originating summons cannot be heard and disposed of on the first return date endorsed on the originating summons. Once the originating summons is served the defendants invariably ask for time to file a reply. There might be further counter-affidavits. Hence the need for the plaintiff to file a final affidavit to ensure that it claims the exact sum on the date of the actual hearing; and this, the plaintiff has clearly done. The first 'cause to the contrary' did not even make it to the starting block.

The next 'cause to the contrary' in the opinion of the defendants is the alleged breach of s. 257(1)(d). The defendants argued that since prayer (3) of the originating summons merely referred to the reserve price and did not elaborate the meaning of the reserve price as stated in sub-s. (d) "being a price equal to the estimated market value of the land or lease in question", the omission of such words was fatal to the plaintiff's claim. The defendants argued that the word "shall" as stated in s. 257(1) gives it a mandatory requirement. I was referred to *Maimunah bte Megat Montak v. Mayban Finance Bhd* 1996] 3 CLJ 9; [1996] 2 MLJ 422 SC where the then Supreme Court held that the provisions of s. 257(1)(a) - (d) of the NLC were mandatory. In that case the court had failed to fix a date for the public auction and had also failed to stipulate the amount actually due under the charge.

In the case before me the plaintiff specifically prayed for an auction date. Whilst I had given an order in terms of prayer (2), I had omitted to fix an auction date. In *Oriental Bank Bhd v. Syarikat Zahidi Sdn Bhd* [1999] 1 CLJ 810 I had, upon review granted the plaintiff's application to fix an auction date. I held in that case that the court has to determine whether the omission to include a specific date in an application for an order for sale was due to a mistaken appreciation of the evidence or of the law or whether it was due to an accidental slip or omission. In that particular case the error arose out of

counsel's omission to ask for a specific date although he had prayed for an order that a date be set not less than one month from the date the order for sale was made. In this case since not even the draft order has been filed, I shall exercise my discretion under the slip rule and include an amendment to prayer (2) and fix the auction date in September. As for the omission of the words describing the reserve price, I had also in the cause of the hearing acceded to the plaintiff's request to exercise my discretion under s. 257(2) and directed the SAR to fix a reserve price to comply with the omitted words. To my mind the omission of the words is not fatal; what is relevant is that there was to be a reserve price, and surely there must be a basis to fix a reserve price and that basis must be found in sub-cl. (d).

The next 'cause to the contrary' as raised by the defendants relates to the plaintiff's reliance on O. 83 of the RHC instead of the provision under s. 271 of the NLC which deals with recovery of vacant possession. As for this presumed conflict of judicial opinion as to the applicability of the provisions of O. 83 r. 3 of the RHC to an application for an order seeking enforcement of a charge registered under the NLC by way of an order of sale, the Supreme Court in *Maimunah (supra)* preferred the decision of Shankar J (as he then was) in *Citibank NA v. Ibrahim Othman* [1994] 1 MLJ 608 to that of Abdul Aziz bin Mohamad J in *Perwira Affin Bank Bhd v. Tan Sian Ser* [1995] 2 CLJ 133.

Abdul Aziz bin Mohamad J was of the view that the treatment of an application for an order for sale must necessarily be different from that of an action for the payment of moneys secured by the charge because the conditions for the success of an application for an order for sale are subject to the NLC whereas the conditions for the success of an auction for payment of moneys secured by the charge are not. His Lordship therefore expressed the view that recovery for vacant possession must be dealt with under ss. 270 to 277 of the NLC. Shankar J however saw no conflict between the provisions of O. 83 r. 3 of the RHC and s. 257(1)(c) of the NLC.

In any case it is the plaintiff's submission before me that it is relying on O. 83 r. 3 of the RHC. In all the circumstances, therefore, I granted the plaintiff order in terms of prayers (1), (2), (3), (4), (5) and (6). As for prayer (2) I have since fixed the date of auction as 30 September 1999. As for prayer (3) I had directed that in fixing the reserve price the SAR do comply with the meaning attributed to reserve price, as stated in s. 257(1)(d) of the NLC.